APPEAL NO. 93406

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on April 29, 1993, in (city), Texas, before (hearing officer). The hearing officer determined that on (date of injury), the claimant sustained a work-related injury while in the course and scope of his employment; however, she held that he did not timely report such injury as required by Article 8308-5.01(a), that there was no showing that the employer or the carrier had actual knowledge of the injury, and that the claimant did not establish good cause for failing to timely report his injury. The appellant, hereinafter claimant, alleges error in the hearing officer's failure to find that he failed to inform his supervisor of his injury within 30 days of (date of injury).

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who testified through an interpreter, stated he had been employed by Trees, Inc. (employer) since 1983. On (date of injury), he said that while shoveling gravel with a coworker, (Mr. V), he injured his back. The next day he said he told his supervisor, (Mr. G), that he had hurt his back. However, he continued to work, with pain, until February 12, 1992, and did not mention his injury again to Mr. G until that date. He said he told Mr. G on February 12th that he needed to see a doctor; he said Mr. G told him he could not take him to the doctor that day but that claimant should call him again the next day.

Mr. G, however, testified that he first became aware of claimant's back injury on February 12th; he denied being told of it in July. He further testified that the claimant did not work on July 15th, and that Mr. V was not hired as a full-time employee until July 22, 1991 (although he had been a temporary employee the previous April). The claimant maintained that he remembered the date of injury was July 15th because he worked a second job at the time which he had been unable to go to because of his back. Joe Herrera (Mr. H), employer's foreman, testified that claimant did not tell him of an injury in July, and that he observed claimant on the job and did not notice claimant was unable to perform his work until February 10, 1992. Both Mr. G and Mr. H testified that claimant was a good employee.

An affidavit of Mr. V, who at the time of the hearing no longer worked for employer, stated that he worked for employer in June or July of 1991; that he and claimant were shoveling gravel when claimant told Mr. V he hurt his back; that on the following day he saw claimant holding his back while talking with Mr. G; and that claimant told him he had told Mr. G about his back injury.

While not an issue on appeal, the medical evidence shows claimant sought medical treatment beginning in February 1992, and has been treated since that time for low back pain.

The 1989 Act provides that an employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Article 8308-5.01(a). The purpose of such requirement is to give the insurer an opportunity immediately to investigate facts surrounding an injury, DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). An employee's failure to so notify the employer relieves the employer and its insurance carrier of liability unless the employer or person eligible to receive notification or the insurance carrier has actual knowledge; the Commission determines that good cause exists for failure to give timely notice; or the employer or insurance carrier does not contest the claim.

The claimant in this case testified that he told an employee in a supervisory capacity, Mr. G, about his injury the day after it occurred. (As the hearing officer noted, there was no evidence that Mr. V was a supervisor.) Mr. G testified, conversely, that claimant did not inform him of an injury until some seven months after it had occurred. These and other conflicts in the evidence were for the hearing officer to resolve. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). He or she may believe all, part, or none of the testimony of any witness, Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.), and may believe one witness and disbelieve others, Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). Upon our review of the evidence, we find that the hearing officer's decision in this case is supported by evidence in the record, and is not so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. In Re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge